CASES AND CONSTITUTIONAL PROVISIONS

Constitutional Provisions and Statutes.

IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 49 Ill. 2d 137, 273 N.E. 2d 592 (1971).

JURISDICTION

The Judgment of the Illinois Supreme Court was entered on July 9, 1971. A timely Petition for Rehearing was denied by that court on August 24, 1971. That court's Order of Denial appears in the Appendix hereto. This Petition for Certiorari was filed within ninety (90) days of that date; and granted April 3, 1972.

QUESTIONS PRESENTED

1. Whether the highest court of a State can ignore the existence of a new (1970) Constitution of that State;—

Which Constitution had been adopted, and by its terms went into effect and became the Supreme Law of that State prior to, *and was in effect at the time* of that court's decision of a case directly challenging the Federal constitutionality of a recent Amendment to the prior (1870) Constitution of that State; and, — Which Amendment had previously been submitted to, and was overwhelmingly approved and adopted by the electorate of that State as the first step of a program for the gradual, but total abolishment of the personal property tax in that State; and—

Despite the fact that it was properly urged in both pleadings and oral argument in the State court that the integral significance of the new Constitution to the Amendment challenged, and of that Amendment to the new Con-

stitution; proved the immunity of the Amendment to the infirmity charged. And despite the fact that the highest court of that State, without significant exception, until the decision in that case had declared that the law of that State required that court to apply the law of the State as that law existed at the time that case was decided by it, and not as it was at the time that case might have arisen; and—

Whether, in a matter of such ultimate public consequence, and involving consideration of such exquisite juridical intimacy as that presented by the unique triumvirate of prior State Constitution, present State Constitution, and Federal Constitution; and where the importance of each to the other, and all of which, has been directed to the attention of that court. Under such circumstances, can that court ignore the existence of one member of that triumvirate (the new State Constitution) so totally, that the Opinion issued by that court is utterly devoid of any mention, or even the slightest intimation, that a new Constitution was in effect in that State at any time, before, or during the pendency of that case before that court; and—

Whether the highest court of a State can ignore the existence of a new State Constitution, — the presence of which has been properly directed to its attention, and the import of which on the issue before the court has properly been urged; — and limit its examination, in determining the public policy of that State, to inquiries exclusive of that new Constitution; and—

Whether, under such circumstances, the highest court of a State can avoid, by absence of any mention in the Opinion it issues, its obligation, and, duty, — in a case of profound importance and grave future consequence to the people of that State, — to address itself to substantial issues raised, consider vital facts urged, and refrain from

recognizing, publishing, confronting, and disposing of such matters.

Whether the Illinois Supreme Court committed grave error in refusing to comprehend the public policy of that State, by ignoring that public policy as declared by the electorate and embodied in both Article IX-A of the prior Constitution and the new (1970) Constitution.

2. Whether the highest court of the State of Illinois, although properly employing the basic criterion established by this Court to measure conformance to the equal protection clause of the Fourteenth Amendment of classifications, has improperly interpreted and applied the pronouncements of this Court, and reached a conclusion wholly beyond the protection which that clause of the Fourteenth Amendment was intended to assure.

3. Whether the highest court of the State of Illinois, by ignoring that State's new Constitution, the existence of which was properly directed to its attention, and the vital significance of which constitution was properly urged; and by refraining, in its Opinion, from any mention whatsoever of any of these matters, has, by such avoidance in its Opinion, denied to these petitioners of due process of law and the equal protection of the law, which entitlement and protection to all persons, including these petitioners, the Fourteenth Amendment was intended to assure.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment, Section 1.

(Equal protection and due process clauses)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTIONS OF THE STATE OF ILLINOIS:

1870 Constitution, Article IX.

" §1. Tax by valuation, how levied

The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person* and *corporation shall pay a tax in proportion* to *the value of his, her* or *its property*—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." (Emphasis added)

1870 Constitution, Amendatory Article IX-A, in effect January 1, 1971.

"Article IX-A

TAXATION OF PROPERTY

§ 1. Taxation of personal property prohibited.

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

1970 CONSTITUTION: Article IX, Adopted in Convention at Springfield, September 3, 1970. In force July 1, 1971.

"SECTION 1. STATE REVENUE POWER

The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

SECTION 2. NON-PROPERTY TAXES—CLASSIFICATIONS, EXEMPTIONS, DEDUCTIONS, ALLOWANCES AND CREDITS

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

SECTION 3. LIMITATIONS OF INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ration of 8 to 5.

(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed.

SECTION 4. REAL PROPERTY TAXATION
(Has no bearing)

SECTION 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes *subsequent to January* 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes *becausc*

of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3 (a) of this Article.
(Emphasis added.)

SECTION. 6. EXEMPTIONS FROM PROPERTY TAXATION

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits.

SECTION. 7. OVERLAPPING TAXING DISTRICTS
(Has no bearing)

SECTION. 8. TAX SALES
(Has no bearing)

SECTION. 9. STATE DEBT
(Has no bearing)

SECTION. 10. REVENUE ARTICLE NOT LIMITED
(Has no bearing)"

STATEMENT OF THE CASE

Illinois Constitution of 1870 was in effect at all times prior to January 1, 1971. Section 1 of Article IX, the Revenue Article, of that 1870 Constitution directed as follows:

Taxation of Property—Occupations—Privileges.

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every *person* and *corporation* shall pay a tax in proportion to the value of his, her, or its property—

such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates." (Emphasis added)

In accordance with that mandate, the General Assembly of the State of Illinois did enact such legislation, which appears in Illinois' statutes as the Revenue Act of 1939, Chapter 120, sections 482 *et seq.*, Ill. Rev. Stats., 1969. Sections 528-560 provide for the taxation of personal property by valuation as to all persons (with the exception of certain usual and recognized exemptions not relevant) without regard to the nature, character, ownership, or the use of that personal property either to produce income or its use for non-income productive purposes.

On February 27, 1970, the Secretary of State, pursuant to law, did cause to be printed, did certify and did publish a document setting forth a proposed amendment (Article IX-A) to be added to Illinois' Constitution of 1870, an explanation of the proposed amendment, the arguments for and against that amendment, and the form in which that amendment would appear upon a separate blue ballot to be submitted to the electorate of the State of Illinois. That document, absent the arguments for and against the proposed amendment, is as follows:

"AMENDMENT
to the
CONSTITUTION OF ILLINOIS
THAT WILL BE SUBMITTED TO THE VOTERS
NOVEMBER 3, 1970

This folder includes

PROPOSED AMENDMENT TO CONSTITUTION,
EXPLANATION OF PROPOSED AMENDMENT
ARGUMENTS IN FAVOR OF PROPOSED AMENDMENT

ARGUMENTS AGAINST PROPOSED AMENDMENT

FORM OF BALLOT

(Seal of the State of Illinois)
Published in compliance with Statute
by
PAUL POWELL
Secretary of State

To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970 a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

PROPOSED AMENDMENT TO ADD ARTICLE IX-A

(Prohibition of taxation of personal property by valuation as to individuals.)

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

EXPLANATION OF AMENDMENT
(See Form of Ballot)"

The form of that ballot and the ballot submitted to the electorate at the state-wide general election held on November 3, 1970, identically contain the explanation of that amendment (Article IX-A), as follows:

"FORM OF BALLOT
PROPOSED AMENDMENT TO ADD

ARTICLE IX-A

(Prohibition of taxation of personal property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.
(Emphasis supplied.)

Place an X in blank opposite "Yes" or "No" to indicate your choice.

☐ YES For the proposed amendment to add Article IX-A to the Constitution. (Pro-

☐ NO hibition of taxation of personal property by valuation as to individuals.)"

Illinois' Constitution of 1870 was amended by the submission to, and overwhelming approval of Article IX-A by the electorate of the State of Illinois on November 3, 1970, which amendment was declared adopted and became part of that Constitution on November 25, 1970, to be effective January 1, 1971.

These petitioners are the officers of the County of Cook, Illinois, each of whom is charged with responsibilities under, and upon whom the Illinois Revenue Act of 1939 (Ch. 120 S 482 *et seq.*, Ill. Rev. Stat. 1969) imposes and compels the performance by each of them of specific duties relating to the assessment of locally assessed personal property taxes.

These petitioners, upon the adoption of Article IX-A to Illinois' Constitution of 1870, proceeded with their respective duties by the assessment of personal property tax against all property *other than* the personal property "owned by individuals and used for their personal enjoyment and that of their families."

These petitioners construed Article IX-A, which prohibited a tax on "Individuals," to intend only the exclusion from taxation of the personal property owned by private persons and used by them for non-revenue producing purposes, which construction recognized that assessors throughout the State of Illinois had established, through long-standing custom and usage, three (3) classes of Personal Property, i.e., that used (1) by corporations, (2) by unincorporated businesses and (3) by Individuals.

These petitioners have always contended, and urge to the Court that their construction is correct, because, exclusive of any other reasons, no other intention is plausibly inferrable from the face of that Amendment and the specific declaration and express assurance submitted to the electorate of that State in the "Explanation of Amendment" that:

"It [Article IX-A] would not affect the same tax levied against corporations and other entities not considered in law to be individuals."

The three cases, consolidated by the Illinois Supreme Court, and in which the judgment to be reviewed here was entered, arose from the adoption of Article IX-A and the intention- ascribed to that Article by these petitioners.

The Posture Below Of The Three Cases Consolidated

Lake Shore, No. 44199, in which these petitioners were defendants, appeared before the Illinois Supreme Court on appeal by these petitioners-defendants from a judgment of the circuit court (the trial court in Illinois) of Cook County, Judge Walter Dahl, presiding. That judgment, conforming with, and adopting the premise urged by plaintiff-corporation there, held that the effect of Article IX-A was *to amend* Illinois' Revenue Act of 1939, whereby that Act discriminated against corporations and in favor of non-corporate entities, thus rendering *that Act as so amended,* offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; the consequence of which, that court held, was to render invalid and void, in its entirety, the personal property tax in Illinois.

These petitioners urged the trial court, and, as appellants, urged the Supreme Court to dismiss that complaint for failure to state a cause of action.

The Illinois Supreme Court reversed and remanded *Lake Shore,* directing the trial court to dismiss that complaint.

Maynard, No. 44308, appeared before the Illinois Supreme Court upon leave granted by that court to file that suit in that court as an original action for declaratory

judgment. These Petitioners were respondents-defendants there. The petitioners-plaintiffs in that case urged that Article IX-A discriminated unconstitutionally against corporations and prayed for the reimposition of the personal property tax on individuals as that tax was so imposed prior to its removal by the People of the State of Illinois in the Referendum held November 3, 1970, in which referendum the overwhelming majority of the voters of that State declared its prohibition.

These petitioners urged the Illinois Supreme Court to dismiss that complaint for want of capacity of those particular plaintiffs to maintain that action.

The Illinois Supreme Court dismissed the *Maynard* complaint. The order of that court, in full, is as follows:

> "And now, on this day, the Court having diligently examined and inspected as well the complaint for declaratory judgment filed by petitioners and the pleas and the Motion by respondents to dismiss the complaint, and being fully advised of and concerning the premises, are of the opinion that the said complaint is not well taken.
>
> THEREFORE, it is considered and ordered by the Court that the said complaint be and the same is hence dismissed."

Shapiro, No. 4432, appeared before the Illinois Supreme Court on appeal by the plaintiffs from the judgment of the circuit court of Cook County, Judge Thomas C. Donovan presiding. Both these petitioners who were defendants there, and the state defendant, filed motions in the circuit court to strike that complaint and dismiss that cause of action. Those motions were addressed exclusively to the merits of the issues raised in the *Shapiro* complaint.

That trial court sustained the infendment of Article IX-A as urged by these petitioners, and held that the prohibi-

tion against taxation declared there applied only to personal property, owned by individuals (natural persons) and used by them for their personal enjoyment and that of their families. Such tax exclusion, that court held, was immune to charges that the retention of that tax in all other regards imposed, resulted in a classification offensive to the equal protection clause of the Fourteenth Amendment.

The *Shapiro* case was the only one of the three consolidated cases that the Illinois Supreme Court considered on the merits and in which it decided the merits. In the *Shapiro* case, that court held, contrary to the position of these petitioners and the judgment of the trial court, that Article IX-A created an unreasonable classification offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Grounds Upon Which The Judgment Of The Illinois Supreme Court Lies.

The sole ground upon which the conclusion reached by the Illinois Supreme Court is predicated appears to be the following:

> "The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but *solely upon the ownership* of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed." (App. page 13).

Applying the criterion to determine whether classification is reasonable, and which criterion was defined by this Court in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389, 406, to include among its measurements:

> "... that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State", (App. page 15),

the Illinois Supreme Court then conceived that:

> "*Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of* 1870...."(Emphasis added.)

Upon the above observations, the Illinois Supreme Court then concluded:

> "Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set." (App. page 16).

The Illinois Supreme Court thereupon concluded with the following judgment:

> "We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the Fourteenth Amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected." (App. page 17).

On November 22, 1971, the petitioners herein filed with Court a petition for Writ of Certiorari to the Supreme Court of Illinois to review their decision in Consolidated Cases Nos. 44199, 44308, 44432 entered on July 9, 1971.

ARGUMENT

I.

THE STATE COURT SINGULARLY IGNORED, AND FAILED TO FOLLOW AND APPLY THE SUBSTANTIVE RULE OF LAW ESTABLISHED BY THAT COURT, IMPOSED UNVARYINGLY, AND INDEED, INVOKED SUA SPONTE BY THAT COURT PRIOR TO THIS CASE. PROPER SUPERVISION BY THIS COURT OF THE STATE JUDICIARY DEMANDS THAT THE STATE COURT BE SET ARIGHT.

The issues before the state court had been joined, and oral argument was submitted and concluded on June 21, 1971, whereafter that case was before that court under its advisement.

On July 1, 1971, the new (1970) Constitution of the State of Illinois went into effect as the Supreme Law of that state.*

---

*Constitution of 1970: Due to the successful efforts of three legislative study commissions, influential public figures interested in reform, and an overwhelming mandate by the voters, Illinois' Sixth Constitutional Convention convened in Springfield on December 8, 1969. One hundred and sixteen members — two elected from each senatorial district — met at a nonpartisan Convention to revise, alter, or amend the 1870 Constitution.

After 9 months of in-depth study and debate, the members presented their work-product to the People — one they considered to be workable for 25, 50, or as in the case of the 1870 Constitution, 100 years.

The 1970 Constitution was approved by the electorate in a special election held for that purpose on December 15, 1970, two and one-half months after the Convention adjourned sine die. That Constitution provides it is in force, in that state, July 1, 1971.

On July 9, 1971, — eight days after the new (1970) Constitution went into effect, and while that Constitution was the "Supreme Law" in the State of Illinois, the state court rendered its judgment and opinion to be reviewed here.

Bearing in mind the above chronology, the significance of the failure of the state court to apply the rule of law demonstrated below, becomes most apparent, and discloses such gross oversight or error that correction of the judgment below is compelled.

Prior to that present decision of the Illinois Court in the instant case, it had been a long-established principle of Illinois law that courts of review must decide cases before it *in accordance with the law as it exists at the time of such decision* and not as it was at some prior time.

That rule of law is succinctly declared in *Illinois Chiropractic Society* v. *Giello,* (1960) 18 Ill. 2d at page 310:

> "The rule is well established, however, that where the legislature has changed the law pending an appeal *the case must be disposed of by the reviewing court under the law as it then exists,* and not as it was when the decision was made by the trial court. (*Fallon* v. *Illinois Commerce Com.,* 402 Ill. 516; *People ex rel. Hanks* v. *Benton,* 301 Ill. 32; *People* v. *Askew* v. *Ryan,* 281 Ill. 231. *People ex rel. Law* v. *Dix,* 280 Ill. 158. We are bound, accordingly, to review the present decrees in the light of the 1959 amendment, to determine whether defendants may be entitled to the benefits thereof and to determine its applicability to the present proceeding." (Emphasis supplied.)

It suffices to observe that appropriate substitution of the facts here, in place of the facts there, discloses the appositeness of that rule to this case and its necessary application by the state court.

The new Illinois Constitution was in effect. The state court was "bound accordingly, to review" the public policy of that State in the light of the relevance of that Constitution to that public policy.

The application of that rule of law, these petitioners respectfully submit, compels affirmance of the position asserted by them, and the relief sought by them. The state court should have applied that rule of law. Its application would have resulted in that court's judgment upholding the constitutionality of amending Article IX-A of the Illinois Constitution of 1870.

That this rule of law is of such decisive significance, and that its unvarying imposition is demanded, again, most recently, found confirmation by the state court in *Hamer* v. *Mahin,* 47 Ill. 2d 252, (1971).

In that case, in a brief two-page opinion, the state court responded *sua sponte,* and invoked that principle of law to dispose of that case.

That case arose in the September, 1970 term of the state court. That court's judgment and opinion was entered on December 4, 1970.

Article IX-A, the very Article which the state court has now held offensive to the Constitution of the United States, had been declared adopted only ten (10) days prior to that court's judgment, to wit, November 25, 1970 to be in force January 1, 1971.

That court's judgment was rendered there subsequent to the adoption of — but prior to the effective date of Article IX-A.

Indeed, in the instant case, the state court's judgment was not only rendered subsequent to the adoption of, but after the effective date of, and while the new Constitution was in force.

The appositeness between *Hamer* and the instant case is extremely apparent.

These petitioners deem the *Hamer* case to be of such extreme incisiveness and the language and reasoning of the state court to be so vital to this Court's complete understanding of the presentation here, that these petitioners beg this Court's indulgence and set out the entire context of the state court Opinion below, and submit that court's Opinion as their demonstration to this Court of the extreme importance of that rule of law, and the vital significance of the failure by that court to apply that rule in this case.

The *Hamer* opinion, in full, is as follows:

> "Mr. Justice Schaefer delivered the opinion of the court:
>
> This case is a sequel to *People ex rel. Hamer* v. *Jones*, 39 Ill. 2d 360, decided in March of 1968. In the present case, as in that one, the taxpayers, Paul E. Hamer and June T. Hamer, his wife, sought declaratory relief, an injunction and relief by way of *mandamus*, with respect to the asserted failure of the defendant, the Director of Revenue of the State of Illinois, to perform his statutory duty to equalize and assess all taxable property at its full, fair cash value.
>
> Like the complaint in the earlier case, the present complaint alleges that the various types of real property in Lake County, "i.e., residential, unsold lots in subdivisions, improved farm lands, commercial and industrial property, have since 1961 and each year thereafter been assessed and equalized at different per centums [sic] less than the full, fair cash value, varying from twenty percent (20%) to fifty-five percent (55%) of full, fair cash value and said property will, in the future, continue to be assessed and equalized at less than full, fair cash value in contravention of the law." The complaint also contains allegations concerning the

practices followed in Lake County with respect to the assessment of personal property.

In the earlier case this court affirmed the judgment of the circuit court of Lake County which dismissed the complaint on the grounds that to grant the relief sought would create extreme expense, disastrous disorder, and confusion and hardship for taxpayers. In addition, the court held that the taxpayer plaintiffs had failed to allege sufficient facts to show how they were damaged by the conditions they allege. In the case now before us the order appealed from found that the present complaint had remedied those defects referred to in the earlier case 'and complies in all respects with the opinion in the earlier cause.' The order further quoted from this court's opinion in that case and continued with the following finding and order:

> '4. That it is clear from the court's opinion that the Supreme Court has retained in itself alone the right to determine that point in time when the court will no longer defer to legislative action in a matter as important to the state as the raising of its revenue.
>
> It is hereby ordered that the above-entitled cause of action be and it is hereby dismissed without prejudice and without costs being taxed.'

In his brief the Attorney General thus describes the problem in this case: 'For 43 years the legislative mandate has been that all property in the State of Illinois should, for tax purposes, be assessed at its full fair cash value. For many years the administrative branch of the State of Illinois and, more particularly, the Department of Revenue, has not followed and carried out that legislative directive, unquestionably a violation of the legislative directive. For some 11 years plaintiffs-appellants have complained about this violation of the law, and have been engaged in a marathon of litigation seeking to force the Director of Revenue to follow the letter of the law.'

Everyone acknowledges that the problem is a difficult one. This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the constitutional command of uniformity is to be required.

Since the judgment of the trial court was entered, article IX-A was added to the constitution of the State of Illinois. That article, which becomes effective January 1, 1971, provides: 'Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*' Ill. Const., art. IX-A.

The judgment of the circuit court of Lake County is reversed and the cause is remanded for further proceedings in accordance with law. (emphasis supplied.)

Reversed and remanded."

In *Hamer,* the state court *sua sponte* observed and invoked the existence of Article IX-A, which, although adopted, was not yet in effect at that time, as authority for that court's declaration there, that:

> "This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the Constitutional command of uniformity is to be required."

Yet, that same court, in the instant case, having before it the question of the uniformity of classification in Article IX-A, completely ignored and did not even mention the existence of Illinois' new (1970) Constitution, declared by the people to be the Supreme Law in that State, and which which was in effect at that time, as any authority, whatsoever, worthy of consideration in determining the public policy of that State, relevant to the existence and purpose of Article IX-A.

Such discrimination is offensive to the law, resists rationalization, and, indeed, in itself, denies to these petition-

ers due process of law and the equal protection of the law under the Fourteenth Amendment.

Puzzling, additionally, is the fact that unlike in *Hamer*, these petitioners did direct the attention of the state court to the existence of the new (1970) Illinois Constitution in their (appellants') Brief (pages 7 and 8) and, again, directed that court's attention in petition for rehearing filed by these petitioners subsequent to that court's entry of its judgment. (Petition for Rehearing, pp. 17, 18).

That court denied the petition for rehearing filed by these petitioners without comment or opinion.

That rule was confirmed and extended in a subsequent decision of the Illinois Court, *People ex rel. Ogilvie* v. *John W. Lewis, Secretary of State,* 49 Ill. 2d 464 (1971), which held that legislation may be tested by "an already ratified but not yet effective constitution even though the legislation possibly may not have been valid if tested by the Constitution in effect at the time of its passage." (p. 482).

Saying, "We read the cases * * * as standing for the general proposition that the *enactment of legislation in anticipation of an adopted but not yet effective constitutional provision is within the plenary lawmaking power of the legislature* * * *" (p. 483) [emphasis added]

II.

THE CONSEQUENCE OF THE STATE COURT'S FAILURE TO APPLY THE ESTABLISHED LAW IN THAT STATE IS THE DENIAL BY THAT COURT OF CONSIDERATION OF THE NEW (1970) ILLINOIS CONSTUTION WHICH RESULTS IN A CONCLUSION REACHED BY THAT COURT THAT THE PUBLIC POLICY OF THE STATE OF ILLINOIS FAILED TO SUSTAIN ARTICLE IX-A, WHOSE CONSTITUTIONALITY UNDER THE FOURTEENTH AMENDMENT WAS ASSAILED. SUCH FAILURE CONSTITUTES ERROR, OF SUCH GROSS MAGNITUDE, AS TO COMPEL REVERSAL.

As these petitioners inform above, the existence of Illinois' new (1970) Constitution was directed to the attention of all of the courts of that State, both trial courts and the attention of the highest court of that State, and no rules or law of that State, governing the propriety of the timeliness and manner of presentation of this fact have been ignored or violated.

With all due deference to this Court, these petitioners deem their presentation to the state court of these matters to meet the dignity of presentation of those matters to this Court. Those presentations are re-presented to this Court as petitioner's reasons assigned here for the issuance by this Court of its writ of certiorari.

In the Brief filed by these petitioners in the *Maynard* case, these petitioners urged to the Illinois Supreme Court as follows:

"II.

"HOLDING ARTICLE IX-A UNCONSTITUTIONAL, AS PLAINTIFFS PRAY, WOULD FRUSTRATE THE INTENT OF THE ELECTORATE WHO ADOPTED THIS AMENDMENT TO THE ILLINOIS CONSTITUTION OF 1870.

"In addition, we submit that when Article IX-A was adopted by the taxpayers of this State, it was adopted with the expectation that non-revenue producing personalty would be exempt from taxation effective January 1, 1971. And that the tax would continue to be applied to revenue producing property until January, 1979, when the personal property tax was to be totally abolished and replaced by another tax, to be determined by the general assembly. The burden of the replacement tax was to fall on revenue producing property alone. This is provided for in Article IX, Section 5 (b) and (c) of the Illinois Constitution of 1970.

In addition, this section provides that the replacement tax, if it is to be measured by income, be an exception to the 8 to 5 ratio established in Article IX, § 3(a) of the Illinois Constitution of 1970.

If plaintiff's argument that Article IX-A is unconstitutional prevails, the exclusion from taxation of individuals will be void. 'Individuals' will therefore remain within the class of persons who are subject to the personal property tax after January 1, 1971. Therefore, when the personal property tax is abolished on or before January 1, 1979, and the replacement tax levied, 'individuals' will be subject to that replacement tax. Since the replacement tax, if measured by income, is not subject to the ratio-limitation of 8 to 5, such a tax could well be applied uniformly. That result, we submit, not only frustrates and subverts the intent of the drafters of Article IX-A of the Illinois Constitution of 1870, and the Illinois Constitution of

1970, but the understanding and expectation of the electorate who adopted these measures as well."

Again, in the petition for rehearing filed by these petitioners in the state court, they urged the following:

"POINT II"

"This Court Has Overlooked The Intimate Relationship, Interdependence, And Integral Consanguinity Between Article IX-A Of Illinois' Constitution Of 1870, And Revenue Article IX, Sections 5 (b) (c) And Section 3 (a) Of Illinois' New Constitution Of 1970, In Effect In This State Since July 1, 1971. It Is Both Of These Articles, Together, As One Entirety, (Not, As Misapprehended By This Court, Article IX-A, Alone) Which Impart The Purpose Sought To Be Accomplished And The Policy Of This State Declared By Its People To Be The Abolishment of ALL Personal Property Tax In The State Of Illinois; And, As Well, The Policy Of This State As To The Removal Of That Tax From The Classes Bearing Its Imposition; And, As Well The Consequences Enuring To Those Classes of Taxpayers From Whom The Imposition Of That Tax Is Removed: All In Accordance With The Program Established By The People Of This State To Accomplish This Objective.

Recognition Of This Policy, Declared By The People Of This State To Be The Policy Established In This State, Comes Well Within The Criterion Held To Be Determinative Of The Validity Of Article IX-A, And Compels This Court's Observance Thereto, And The Reversal Of Its Present Judgment In Compliance Therewith.

"This Court's presently standing judgment declares Article IX-A violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. That conclusion emerges, the opinion of this Court informs, because the reasoning em-

ployed by the Court compels it to find that the classification established in Article IX-A fails to meet the tests invoked by the Court when passing upon the validity of legislation assailed under the equality clause of the Fourteenth Amendment. This Court's reasoning appears as follows:

First, this Court on Page 17 of its presently standing opinion, declares that,

> 'The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed.'

After that observation, this Court next considers those criteria which are determinative of 'reasonableness of classification,' and adopts the criterion established on Page 21 of its opinion as the measure appropriate to that determination.

> 'Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; *that the object of the clarification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State;* and that the difference must bear a relation

to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible'." (emphasis supplied.)

Immediately following this exposition this Court then proceeds to apply that criterion to measure the reasonableness of the classification in Article IX-A to ascertain its conformance with the requisite of that criterion 'that the object of the classification (intended by Article IX-A) must be the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state. . . .'

That answer, this Court conceives, however must appear from and this Court deems its search for this answer to be confined solely to the area of inquiry circumscribed on page 21, as follows:

'Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, . . .'

Whereupon, this Court then says on page 22, that its search, conducted within the confines of this limited area of inquiry, reveals that:

'Against *this background* the incongruity of the prohibition contained in Article IX-A is apparent. It *cannot rationally* be said that the prohibition *promotes any policy* other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others.' (emphasis supplied.)

This Court then concludes:

'We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment.'

The syllogism employed by this Court from which the conclusion announced by this Court emerges, is

predicated upon the major premise found on Page 17 of this Court's opinion and quoted in full above.

This Court has misapprehended the purpose of Article IX-A. Contrary to this court's conclusion, that Article states that notwithstanding any other provisions in any of the laws of this State which impose that tax, the declared purpose of Article IX-A is to remove that tax, setting aside and holding for naught all provisions of the law which impose that tax. It is Article IX-A which removes the tax imposed. Article IX-A imposes no such tax. That this is so, clearly emerges from the observation that: if the purpose of Article IX-A was to impose such tax it would not have been necessary to submit the question of such tax imposition to the people of this State. That tax was already imposed on them. In addition, if that were the purpose of Article IX-A, these petitioners respectfully submit that Article IX-A, when submitted to the people of this State on November 3, 1970, would have suffered the most ignominious defeat at the polls ever recorded in the history of this State.

This Court's premise is that Article IX-A imposes a property tax. Of course, then, when Article IX-A is viewed in the light of Revenue Article IX of Illinois' new Constitution of 1970 which declares the abolishment and removal of that tax, the only conclusion emergent is that these two Articles are in direct conflict, the purpose of each separate and unrelated to each other, and on their face reject identity of objective — to effectuate one policy. Of course, in this context the comparison of these two conflicting purposes affords no indication of the policy of this State or the purpose for prohibiting prior to July 1, 1971 — the effective date of the new Constitution — the imposition of personal property tax on the class intended by Article IX-A; but invites the conclusion reached by this Court on Page 22 of its present opinion that, solely against the background of Article IX of Illinois' Constitution of 1870, no State policy is disclosed nor is the accomplish-

ment of any State purpose revealed, other than the removal of that tax from one class of taxpayers, while denying the enjoyment of such removal by other classes.

However, once the correct premise is discerned, to wit: that Article IX-A declares its prohibition exclusively as to that tax on the personal property owned by individuals and used for their personal enjoyment and that of their families; the criterion employed by this Court to determine the reasonableness of that classification invokes approval of that sole application of that prohibition to that class alone. The object of that classification then is discerned to be the initial and necessary step in the accomplishment of a purpose and the promotion of a policy which is within the permissible functions of this State.

This conclusion necessarily follows because, then, when Article IX-A of the 1870 Constitution is viewed in the light of Revenue Article IX of the new 1970 Constitution, it appears that both Articles deal with the removal of that tax and are integrally essential to the accomplishment of, and dedicated to the effectuation of the policy declared by the people of this State. A policy selected and approved by them: the abolishment, elimination and removal of that tax.

For this Court's convenience of comparison, Section 5 of Article IX of Illinois' new Constitution of 1970, as well as Section 3 (a), is set out in full as follows:

'Section 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any of all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article.'

'Section 3. LIMITATIONS ON INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.'

These petitioners respectfully submit that once the misapprehension resulting in the present judgment is discerned, the import of the relationship between Article IX-A of the 1870 Constitution and Article IX of the new 1970 Constitution readily emerges. Likewise, readily emergent, is the significance of the synthesis and entire reliance of the new Article IX upon the established existence, the validity of the existence and the continued existence of Article IX-A, and the importance of the consideration of both old and new Articles in the determination of the declared policy of

the State of Illinois; of which, it is apparent, Article IX-A is but the initial step in the accomplishment of the policy declared by the people of this State to be the abolishment of that tax. (See also Brief of County Defendants Edward J. Barrett, et al., Point II, P. 7.)

The policy of this State thus overwhelmingly appears and resoundingly declares the abolishment of that tax on *ALL* personal property in the State of Illinois wherever situated; whatever its ownership; and howsoever used. That policy declares as well the removal of that tax from the classes bearing its imposition and declares as well the consequences enuring to classes of taxpayers from whom the imposition of that tax is removed; and, as well, that the removal of that tax be accomplished in accordance with, and in the manner prescribed in the program established by the people of this State to accomplish the eventual removal of the imposition of that tax from all classes of taxpayers by January 1, 1979.

These petitioners respectfully submit that the foregoing observations should compel this court's reconsideration and this court's agreement with the position of these County officer defendants-petitioners and the granting of the relief for which they have prayed.

This Court will recall that, on oral presentation, the State's Attorney of Cook County directed the Court's attention to personal property tax collection reports which were provided by the Cook County Defendants. These reports reflect the collection of $149,657,296.21 in Cook County for the year 1969. Of this sum only $1,975,983.46 was collected from 318,881 'Individuals' (the term 'Individual' does have a technical meaning in Personal Property Tax administration and practice if not in law), while $147,771,312.85 was collected from 170,129 'non-individual' taxpayers.

This comparison is resubmitted for this Court's reconsideration, to demonstrate the insignificance of the economic consequences to tax supported bodies result-

ing from the removal of that tax from the class intended by Article IX-A, contrasted with the social and administrative advantage of reducing the number of taxpayers on the rolls by nearly two-thirds. We submit that these consequences are the essence of reasonableness; and that they reinforce these defendants' thesis that Article IX-A does not stand alone as an isolated instance of the removal, or imposition, of a tax, *BUT*, to the contrary it is the initial, integral step in a single unified program which, when completed, will eliminate the personal property tax in its entirety and remove its burden from each and every class of taxpayer. *AND*, that Article IX-A of the 1870 Constitution and Article IX of the 1970 Constitution bear a symbiotic relationship each to the other; so that violence done to one is violence done to its companion.

Indeed, this Court's presently standing opinion and judgment seriously impugns the constitutional integrity of Article IX of the Illinois Constitution of 1970."

The public policy of the State of Illinois, as that policy appears from Article IX-A and the new (1970) Constitution patently declares the abolishment of the personal property tax in Illinois. That public policy, just as patently, declares that such abolishment shall not be done in one sweeping blow because of the disruptive consequences to revenue, which is applied principally to maintenance and operation of public schools, by instant and total abandonment. To the contrary, Article IX-A and the new (1970) Constitution provides for the attainment of that goal over a period of time, and in several stages, whereby the economy and replacement revenue of the State can be appropriately adjusted and attuned to the eventual removal of that tax.

Indeed, the public policy of that State, in the recognition of the problems with which that State would be confronted, establishes a program and provides for a proce-

dure no different than that declared by this Court to be most appropriate to similar circumstances and concerns in the School Desegregation Cases. There, this Court refused to find offensive, but, to the contrary, recognized as necessary that the resolution of problems of grave public concern and consequence often requires accomplishment in graduted steps and progressive stages. That recognition finds exquisite identity here.

These petitioners respectfully submit that the foregoing facts, reasons, and argument should have persuaded the state court initially, to recognize the existence of the new (1970) Illinois Constitution; appreciate the integral relationship between Article IX-A of the 1870 Illinois Constitution and the new (1970) Constitution; apply the established rule of law whose application these petitioners respectfully submit, is compelled in that State; and accordingly hold Article IX-A to be valid. Failure by that court to do so resulted in a judgment wholly inconsistent with the public policy of Illinois, contrary to the law of Illinois, and refuted by the teachings and decision of this Court.

III.

THE OPINION OF THE STATE COURT RESULTS IN THE DENIAL TO THESE PETITIONERS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WITHIN THE INTENT OF THOSE CLAUSES OF THE FOURTEENTH AMENDMENT, FOR THE REASON THAT THE PRESENTLY STANDING OPINION OF THAT COURT DENIES THESE PETITIONERS A FAIR TRIAL WITHIN THE DEFINITION DECLARED BY THIS COURT.

These petitioners respectfully submit that the following chronology demonstrates, best of all, the intimacy and

integral relationship between Article IX-A of the 1870 Constitution, and the new (1970) Constitution, and that the embodiment of both, standing together, declare the public policy of the State of Illinois, and makes manifest the error in the judgment entered by the State court which totally ignored the existence of the new (1970) Constitution.

1970 CONSTITUTION:

December 9, 1969 — Illinois Sixth Constitutional Convention Convened.

October 1, 1970 — Constitutional Convention Adopted New Constitution and Adjourned.

December 15, 1970 — Adopted by Electorate at Special Election.

July 1, 1971 — To Be In Effect.

ARTICLE IX-A (1870 Constitution):

February 27, 1970 — Disseminated to Electorate, Notice, Etc. of Proposed Amendment.

November 3, 1970 — Approved by Electorate.

November 25, 1970 — Declared Adopted and Became Part of 1870 Constitution.

January 1, 1971 — To Be In Effect.

JUDGMENT OF STATE COURT:

July 9, 1971.

In addition to the reasons assigned under the preceding point, the concurrence, and immediacy of occurrence, of both Article IX-A to the 1870 Constitution and the new (1970) Constitution, as shown above, without more, demonstrates their consummate singleness; and totally rejects the State court's attempt at their divorcement.

It appears that the new (1970) Constitution was submitted to and adopted by the electorate of that State on

December 15, 1970. That Constitution declares the abolishment of all personal property tax in that State, and publishes the program for such eventual total removal, and the method employed for such accomplishment. As heretofore observed, paragraph (b), section 5 of Revenue Article IX of the new (1970) Constitution specifically prohibits the imposition of any tax theretofore abolished. It reads as follows:

> "Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated."

If Article IX-A, then, is not an integral part of, and the first step in the program declared to be the public policy in that State for the eventual abolishment of all those taxes, then no need would exist for such a specific admonition in the new (1970) Constitution.

Of course, the public policy of Illinois in regard to the passage and purpose of Article IX-A cannot be determined absent examination of the Revenue Article of its new (1970) Constitution.

Again, it defies reason to assume that the electorate were unaware of the identity between Article IX-A and the new (1970) Constitution, and the purpose of both to accomplish the ultimate removal of that tax from all in accordance with the program which they established.

Every media, in every way, informed the electorate as to every component, proposed and adopted in both Article IX-A to the 1870 Constitution, and the new (1970) Constitution, from the date Illinois' Sixth Constitutional Convention convened on December 9, 1969, through the approval of Article IX-A to the 1870 Constitution, on November 3, 1970, and through the adoption, less than five (5) weeks after that, of the new Constitution, on December 15, 1970.

Of course, determination of the public policy of Illinois demands measurement by its new (1970) Constitution.

Indeed, why the need, to submit Article IX-A to the electorate on November 3, 1970, when the new (1970) Constitution was to be submitted to them just a few weeks later on December 15, 1970, unless the passage of Article IX-A was an integral factor: its precedent occurrence anticipating the Revenue Article in the new (1970) Constitution, and subsumed by the Revenue Article of the 1970 Illinois Constitution.

Of course, the public policy of the State of Illinois demands consideration of Illinois' new (1970) Constitution.

The failure of the State court to observe and apply these considerations constitutes error so manifest that such oversight, indeed, denies to these petitioners the fundamental right to a fair trial assured them by the due process and equal protection clauses of the Fourteenth Amendment.

These petitioners respectfully direct the Court's attention to the Illinois Attorney General's change in position as reflected in his Petitions for Certiorari on the one hand and his Brief on the other.

At page 41 of his amended petition the Attorney General states, "Either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct."

In the brief which the Attorney General filed, he urged that *only* the dissent of Justice Davis was correct.

Consequently, these Petitioners adopt the issues and presentation of those issues abandoned by the Attorney General; that is, either of the alternative positions — that of Judge Donovan or that of Mr. Justice Davis is correct AND, in the event this Court should determine, contrary

to the interpretation of the State's Attorney of Cook County in this regard, that the term "Individuals" encompasses unincorporated businesses as well: that distinction is a valid one and not offensive to the United States Constitution for the reasons assigned by Governor Richard Ogilvie in his *amicus* brief.

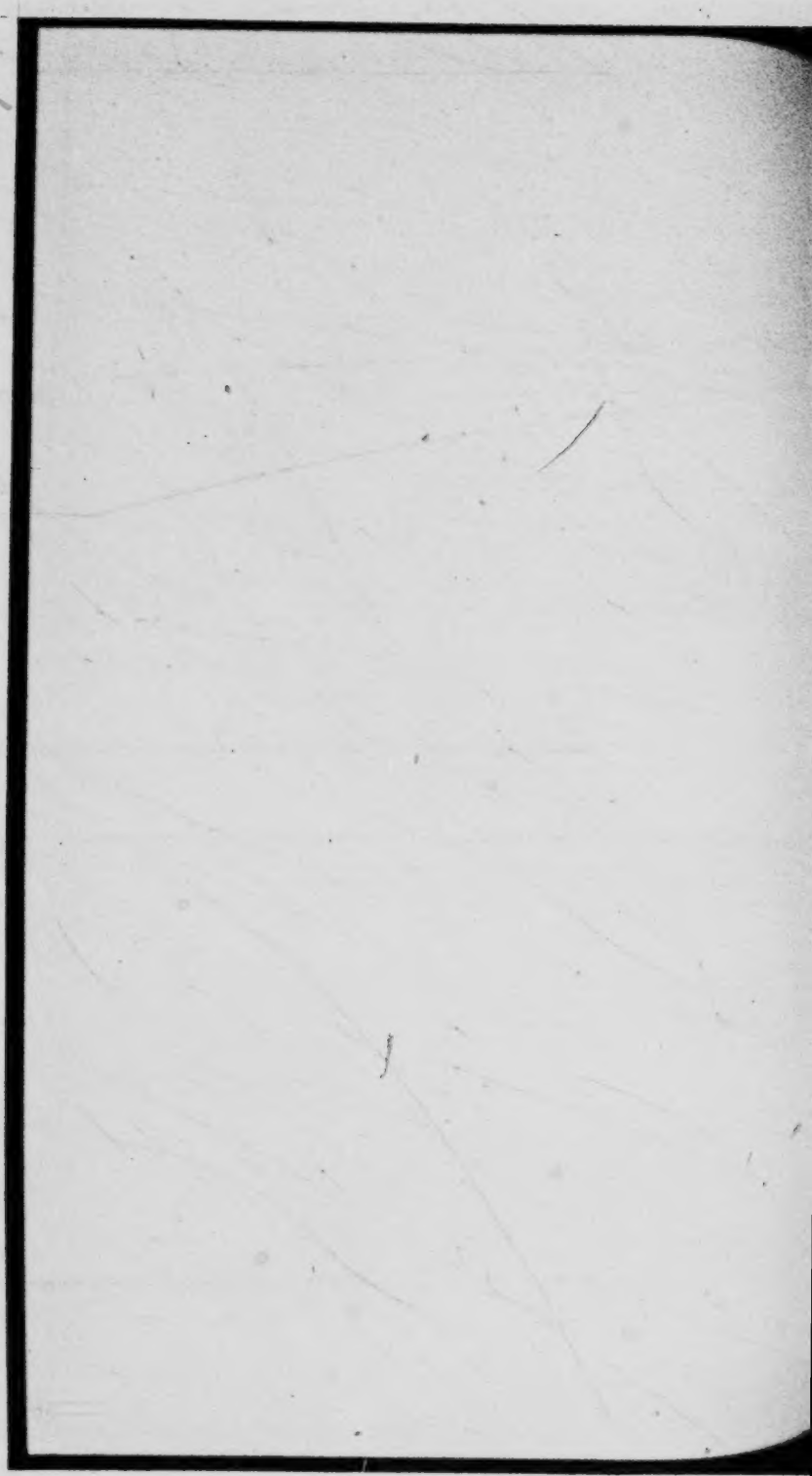
CONCLUSION

For the reasons and upon the grounds stated, these Petitioners respectfully urge this Court to reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

EDWARD V. HANRAHAN,
State's Attorney of Cook County, Illinois.
Room 500 — Chicago Civic Center,
Chicago, Illinois 60602, Tel. (312), 321-5464,
Attorney for Petitioners.

AUBREY F. KAPLAN,
Assistant State's Attorney,
Of Counsel.



FILE COPY

FILED

JAN 12 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., INC., ET AL.,

Respondents.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.)

REPLY BRIEF OF THE PETITIONER.

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570),

Attorney for Petitioner.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

Printed by the Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-685.

ROBERT J. LEHNHAUSEN,
Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., INC., ET AL.,
Respondents.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.)

REPLY BRIEF OF THE PETITIONER.

ARGUMENT.

The respondent's position is threefold: that there is no reasonable governmental objective underpinning the exemption of individuals from the payment of an ad valorem tax on personalty; that the fourteenth amendment blanketly prohibits differentiation between individuals and corporations for the purpose of personal property taxation; and that as a litigant in this action, he is entitled to the financial reward of total exemption from the payment of the property tax. Each of these arguments is fatally defective.

It should be noted at the outset that both the petitioner and respondent agree that the Illinois tax on personal property prior to the adoption of Article IX-A was virtually im-

possible to administer and resulted in grossly disproportionate assessment and payment of the tax among residents of the various counties of the state. While individuals in some counties paid no tax, individuals residing in other areas were assessed to the full extent provided by the statute. Indeed, from the figures available, the only uniformity in the administration of this tax on a state-wide basis occurred in the assessment of corporations.

Since this tax is a major source of revenue for the State of Illinois, its immediate total abolition was impossible. However, rather than allowing the inequities inherent in the assessment of the tax to continue, the Illinois legislature determined that a course of action which would ultimately result in the total elimination of this tax while providing some immediate relief was necessary. Thus, the legislature proposed and the voters by referendum adopted an amendment to the Illinois Constitution exempting individuals from the payment of the tax on personalty. Ill. Const. (1870), Art. IX-A.

As the petitioner demonstrated in his original brief, this case is somewhat unique in that the objectives sought to be accomplished through the adoption of Article IX-A are clearly delineated in the printed explanation and arguments supporting and opposing the amendment which were submitted to the Illinois voters along with the proposed constitutional amendment. See Petitioner's Brief 12-14; Petition 10-15. The express purpose of Article IX-A is to effectuate the elimination of the ad valorem tax on personalty by exempting initially those persons upon whom the tax operated most unfairly—individuals. The underlying motivation to encourage a total revision of the Illinois taxing structure in this field resulted in the inclusion of Article IX sect. 5(b) and (c) in the new Illinois Constitution which was subsequently enacted and which requires the total abolition of the personal property tax in

Illinois before January 1, 1979. Ill. Const., Art. IX, sect. 5(b), (c).[1]

Thus, as the first step toward accomplishing the stated objective of totally eliminating the personal property tax, the Illinois legislature formulated a classification by which those persons defined under Illinois law as individuals were exempted from payment of the tax.

In an argument which is notable for its lack of binding precedent,[2] respondent alleges that such a classification

1. Respondent seeks to enhance his position by arguing that it is doubtful that the personal property tax ever will be abolished totally. This argument ignores the clear and mandatory language of Article IX, section 5(c) of the 1970 Constitution which provides:

> "On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971."

2. The respondent places heavy reliance on the California Railroad Tax cases: *San Mateo County* v. *Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. per stip., 116 U. S. 138 (1885); and *Santa Clara County* v. *Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grnds, 118 U. S. 394 (1886); and elevates them to "Supreme Court status" (Resp's Br. 25) on the authority of the opinion in *Quaker City Cab. Co.* v. *Pennsylvania*, 277 U. S. 389 (1928) and his conjecture that the dissenting Justices would have concurred in that opinion had they agreed with respondent's characterization of the tax there in question. The necessity of such an argument reflects the inherent weakness of respondent's position.

The California Railroad Tax cases arose under a state constitutional provision requiring uniform taxation of real property proportionately to its value. The cases involved the validity of a state statute, which despite the California constitutional provision, denied railroads holding real property a deduction for mortgages held on the property while allowing the deduction to all others holding such property. The state court struck down the statute and this Court affirmed the decision without reaching the question presented by the instant case.

Respondent's attempt to rationalize the dissents of Mr. Justices Holmes, Brandeis and Stone in *Quaker City Cab Co.* v. *Pennsylvania, supra,* out of existence is equally ill-founded. It ignores

when made for property tax purposes is impermissible under the equal protection clause of the fourteenth amendment. In effect, the respondent adopts the superficial reasoning of the Supreme Court of Illinois that a distinction between "individuals" and "corporations" for this purpose classifies solely upon the identity of the owner. This conclusion ignores the fact that the identity of a corporate owner cannot be separated from the advantages which enure from the privilege of doing business in the corporate form. These advantages are significant (See Pet.'s Br. 15), are unavailable to individuals, and underlie the separate classification of corporations and individuals for the purpose of taxation. This Court has repeatedly upheld such classifications for state taxing purposes. See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911); *Ft. Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532 (1920); *Lawrence* v. *State Tax Commission*, 286 U. S. 276 (1932).

In an ill-conceived attempt to undermine the validity of petitioner's reliance on the ruling of this Court in *Allied Stores of Ohio Inc.* v. *Bowers*, 358 U. S. 522 (1959) that a classification based solely on the ownership of property is valid under the equal protection clause if founded upon reasonable differences, respondent attributes to the petitioner the theory that *Allied Stores of Ohio, Inc.* v. *Bowers* overruled the decision in *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 502 (1949). This is not the petitioner's position.

Both the *Glander* case and *Reserve Life Ins. Co.* v. *Bowers*, 380 U. S. 258 (1965) are clearly distinguishable from the *Allied Stores* case. In those cases, Ohio attempted to impose an ad valorem property tax on the intangibles

---

the basic premise of those dissents that the very real and important differences between conducting a business in the corporate capacity and as an individual are a sufficient basis upon which a state may separately classify corporations and individuals for purposes of taxation and may impose upon corporations a heavier tax burden by means of "any of the familiar kinds of taxes" (277 U. S. at 408) which of course would include an ad valorem tax on personalty.

of domesticated foreign corporations while exempting both residents and domestic corporations. This Court held that there was no valid basis for distinguishing between foreign corporations and domestic corporations once the state had admitted the foreign corporations to transact business within the state and had thus placed them on an equal footing with its domestic corporations.

The decision in *Allied Stores of Ohio, Inc* v. *Bowers* rests squarely on the ground that the separate classification of resident and nonresident owners of merchandise held for storage in local warehouses and the exemption from ad valorem taxation of the property of the nonresidents only effectuated the valid state policy of encouraging industry to locate within the state. In that case, as in the instant case, a classification based on the ownership of property is valid when based upon reasonable differences and when enacted for the purpose of furthering a valid state policy or objective.

Respondent's final contention is that Article IX-A of the Illinois Constitution of 1870 exempting individuals from the payment of the ad valorem personal property tax does not offend the fourteenth amendment. Rather, he argues, it is the Revenue Act of 1939, Ill. Rev. Stat. 1939, Ch. 120, § 18 providing for the uniform taxation of all real and personal property located within the State which is invalid under the equal protection clause. This argument apparently is founded on the premise that the respondent is entitled to some financial reward in return for pursuing the instant litigation. (See Resp's. Br. 50-60.)[3] In this case, he asserts that the proper reward is the

3. The cases upon which respondent relies to support this theory are all clearly distinguishable on the basis that in each of those cases, the state attempted to exact some penalty as the price of a litigant asserting his right to challenge a state regulation. Here, there has been no such attempt on the part of the State of Illinois. The respondent's position with respect to his liability to pay the personal property tax is no different than it was prior to the enactment of Article IX-A. He was liable then and is liable now for the payment of that tax under Illinois law.

total exemption of individuals and corporations from the personal property tax.

This theory ignores the fact that the two complaints challenging Article IX-A are the basis for this litigation. The provisions of the Revenue Act of 1939 prior to the enactment of Article IX-A have not been challenged herein. The sole issue upon which this Court granted certiorari was whether a state constitutional provision which distinguishes between corporations and individuals for the purpose of imposing an ad valorem tax on personal property violates the equal protection clause of the fourteenth amendment? That is the only proper issue before this Court for decision.[4]

CONCLUSION.

For the foregoing reasons as well as for the reasons asserted in the petitioner's brief, the petitioner respectfully requests this Court to reverse the decision of the Supreme Court of Illinois in this case.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570),
Attorney for Petitioner.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

4. The respondent improperly attempts to raise an issue concerning the validity of the class action aspects of the *Barrett* v. *Shapiro* case, No. 71-691, under the due process clause. This issue was not raised by either petitioner in their respective petitions for certiorari. Therefore, that issue is not properly before this Court for decision. *Ryan* v. *United States*, 379 U. S. 61 (1964); *Rorick* v. *Devon Syndicate, Ltd.*, 307 U. S. 299 (1939); *Steele* v. *Drummond*, 275 U. S. 199 (1927).